IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 205

In Re: CLYDE WILSON SUMMERS,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF RESPONDENTS.

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STATEMENT OF THE CASE.

The Supreme Court of Illinois, sustaining a determination embodied in the recommendation of its Committee on Character and Fitness of Applicants for Admission to the Bar of Illinois, has deemed the petitioner disqualified for the responsibilities of a member of the bar because of his persuasion not only that mili-

tary force is never justified but that the taking of human life is, regardless of circumstances, always and in all cases, indefensible.

Before undertaking an interpretative demonstration, which demonstration will more appropriately appear in the Argument, that the Supreme Court of Illinois did not act so arbitrarily as to deprive the petitioner of any constitutional right in reaching the conclusion that his convictions and attitudes are inconsistent with those which Illinois requires of her lawyers, we state, without argumentative commentary, the substance of petitioner's own statements of his ethical convictions as those statements appear in the transcript of the full hearing that was accorded him by the Committee.

The statement in petitioner's brief* that petitioner has been refused admission to the bar "on the sole ground that he is a conscientious objector to participation in war by reason of his religious training and belief and had been classified as such by his draft board," is, although not intentionally unfair, nevertheless quite incorrect and very seriously misleading.

As will appear from the summary of the evidence which is undertaken in the following paragraphs of this statement, petitioner's moral creed goes much further in interdicting homicide than would normally be implied by mere objection to war and military activity. It extends to the complete rejection of those principles of Illinois' constitutional, statutory and common law which not only authorize but require, when necessary, the killing of members of a mob in order to save a prisoner

* By amicable stipulation of counsel for petitioner, in order to expedite the hearing of this case, the time for filing petitioner's brief has been extended upon petitioner's supplying us with galley proofs thereof. We regret that therefore it is impossible to refer to the pages of petitioner's brief by number.

from being lynched, the taking of life by public officers or private citizens in order to prevent murder, rape or other felony and the preservation of one's own, his wife's, or his child's life by the taking of the lives of other people.

Petitioner, who was twenty-four years old at the time of the hearing (November 27, 1942), spent his earlier days in smaller towns in Montana, Nebraska and Illinois, attended the University of Illinois where he received the degree of Bachelor of Science and Accountancy before studying law (Sup. Tr. 3). He graduated from the University of Illinois Law School and successfully passed the Illinois bar examination.

His religious affiliation has been that of Methodist "as far as he can remember." He has been active in the work of his church, having worked in the Wesley Foundation at the University of Illinois and having been chairman of religious education and worship committees, vice-president and president of the council and student assistant to the minister in successive years. He has preached sermons and led worship societies. He has a brother who is a captain in the military service (Sup. Tr. 4).

He was classified as a conscientious objector by his Draft Board, having been accorded the classification appropriate to one determined to be of that *status* of 4-E. He is not in a conscientious objectors' camp because he did not pass the physical examination.

His church does not, like certain other churches, enjoin conscientious objection to military service as a *credendum* requisite to acceptance of the faith which it preaches, but in petitioner's own language, has "said that they would uphold and support the conscientious

objectors and also conscientious participants" (Sup. Tr. 6).

Petitioner was asked:

> "Q. Don't you believe it is the duty of a just government to defend your life and property even by armed force, if necessary?" (Sup. Tr. 6).

He replied:

> "A. Not military force at least. It is not its duty to do so. It is its duty to defend it, but not necessarily by military force" (Sup. Tr. 7).

He thinks that the American government is worth defending but the question is "whether the force is either a good defense or the best defense" (Sup. Tr. 7). He thinks that the country may be defended by such means as "psychical forces" (Sup. Tr. 8), prayer, non-violent or passive resistance, such as that exemplified by Ghandi and the like. He makes it clear that, in his view, the United States would not be justified in opposing by the taking of life the conquest and subjugation of America by Hitler, the Japanese or other foreign enemies. He leaves the reader of his testimony in no doubt that he believes that we should feed the people of enemy countries "even though they might be in the army" (Sup. Tr. 16). We should not intercept food supplies to enemy armies by "a food blockade or an armed blockade" (*loc. cit.*).

But petitioner's scruples against force as a means of government do not end with his objection to military force as directed against alien invaders. He does not think that officers of government, such as police officers, sheriffs or other constabulary have a right to save a prisoner from a mob by taking a life of a member of the mob (Sup. Tr. 12) even though the prisoner will lose his own life and the primary function of government,

the preservation of its citizens from torture and murder, would be set if the mob is not opposed by violence extending to the slaying of its members.

He says that, if a marauder were about to take the life of his wife and child and he could save his wife and child by slaying the marauder, he would not do so (Sup. Tr. 25).

In short, petitioner's scruples predicate a complete, absolute and utter rejection and repudiation of all of those doctrines and principles of law which logically imply the duty or even the mere right to take human life, including not only the right of the United States and state governments to defend themselves by military exertions but the rights of those governments to save life and protect property by killing assailants or felons escaping from the commission of one crime and bent upon committing another.

It was because of petitioner's affirmation of these views that the Supreme Court sustained the Committee's determination upon the narrow and single issue as to whether the petitioner possessed not only moral character but, in the language of Rule 58 of the Supreme Court of Illinois "moral character **and fitness**" for the office of attorney and counsellor at law as a member of the bar of the Supreme Court of Illinois.

As will be more appropriately demonstrated in the argument, it is because petitioner not only could not himself take life consistently with the precepts of his creed but because he could not conscientiously, as a lawyer, counsel or advise others as to their rights or duties where the taking of life would or might be the result of obedience to the law that he has been deemed not qualified to be an officer of the Supreme Court of Illinois.

I.

A license to practice law, being in the nature of a commission appointing the holder to intendancy in an office of the court, is not within the purview of the Fourteenth Amendment to the Constitution of the United States or any other provision of that Constitution.

This court has twice held that a right to admission to the bar is not a "privilege or immunity" within the meaning of the Fourteenth Amendment.

In re Lockwood, 154 U. S. 116.
Bradwell v. *The State*, 83 U. S. 130.

It is true that in both of these cases, the only clause of the Constitution explicitly invoked by applicants for this court's adjudication was the "privileges and immunities" clause of the Fourteenth Amendment.

But it is quite obvious that the reason that the "due process" clause was not invoked was that, if this court should adjudge a license to practice law to be not even a "privilege", *a fortiori*, it would not be either "liberty or property"; and, by parity of reasoning, if it is not a privilege, immunity, liberty or property, but is, as the court apparently recognized in both of those cases, the American equivalent of "calling to the bar," then it is not within the purview of the equal protection clause; for it has never been asserted that applicants for appointment to governmental offices are, in the absence of some such statute as a civil service law, entitled to equal protection as against preferment of one candidate for appointment over another.

That a member of the bar is an officer of the court is a proposition too well settled to require vindication by elaborate argument.

In re Day, 181 Ill. 73;
The People v. *Czarnecki*, 268 Ill. 278;
The People v. *Peoples Stock Yards Bank*, 344 Ill. 462.

This point has been briefly argued because it is clear and simple. But unless the principles not only enumerated by this court but implicit in the history of advocacy are to be subverted, it is decisive of this case.

II.

The Supreme Court's action in refusing petitioner's application for a license to practice law was not arbitrary or discriminatory.

Under Point I of this Argument, *ante*, it was submitted that a license to practice law is not within the purview of the Constitution of the United States. If that contention is sustained it follows that the reasonableness or unreasonableness of the Supreme Court's action in this or any other case is not open to inquiry by this court.

Under the present point, however, we assume, purely for the sake of argument, that the question of the propriety of the Supreme Court's action is before this court upon constitutional grounds and that this court must determine, in accordance with the usual canons of constitutional law, whether the record convicts the Supreme Court of that arbitrary and unreasonable conduct which is requisite to sustain a charge of denial of due process or equal protection of law.

The relevant provisions of the law of Illinois.

The taking of an oath to support the constitutions of the United States and of the State of Illinois has always been prerequisite to admission to the bar of Illinois.

The present version of Rule 58 of the Supreme Court (which is the rule governing admission to the bar) requires, *inter alia*, that each applicant

> "shall appear before the Committee" (that is, the Committee on Character and Fitness, which is appointed by the Supreme Court pursuant to other provisions of this rule) "and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar."*

The Committee is authorized to certify the applicant for admission only if it is of the opinion "that the applicant is of approved character and moral fitness."

A former version of the rule, extant in 1933, further required that the applicant demonstrate that he "understands and believes in the righteousness of the principles underlying the constitutions of the State and of the United States." Although this language no longer appears in the rule, it disappeared at the time that the rule was rewritten and comprehensively revised and its deletion does not argue that attachment to constitutional principles is no longer requisite to admission to the bar of Illinois.

In addition to those general considerations which the Supreme Court of Illinois deems to be implicit in the

* The full text of the rule, which is long and which contains requirements as to age, citizenship, academics and professional education, passing of bar examinations, etc., is reprinted in full in the Justice's brief in opposition to *certiorari* as an appendix. Its official citation is Illinois Revised Statutes, 1943, Chapter 110, par. 259.58, page 2451.

fundamental thesis of our government and which are hereafter developed, two provisions of the Constitution of the State of Illinois are immediately pertinent:

Section 3 of Article II of Illinois' present Constitution (*Constitution of 1870*, Ill. Rev. Stats. 1943, page 20) consists of the following provision:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, **or justify practices inconsistent with the peace or safety of the state.** No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

The provisions of Sections 1 and 6 of Article XII of the Illinois Constitution (*op. cit.* p. 31) deal specifically and explicitly with state military service and conscientious objectors.

This Court's pronouncements upon topics relevant to the issues here.

In the celebrated *Selective Draft Law Cases*, 245 U. S. 366, this court sustained the constitutionality of conscription by involuntary military service under the 1917 Military Establishments Act. The opinion of Chief Justice White deraigns the power of conscription, as not only a faculty of sovereignty but as the faculty by which sovereignty, with all of its other faculties, is preserved from the earliest of Anglican traditions. After observing that

"the mind cannot conceive an army without the men to compose it," (p. 377)

he epitomizes the history of compulsory military service in America to an extent sufficient to show that in the Revolutionary War, the Civil War and in many instances of internal disorder, exaction of military service has never been deemed to infringe the right of any individual.

Two other holdings by this court that appear to be conclusive upon the present question unless their teachings are to be abandoned are those occurring in *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *Macintosh*, 283 U. S. 605.

In both of these cases, it was held that applicant for citizenship, a privilege certainly as precious as a license to practice law, was properly denied naturalization because he (or in the first case, she) would not state that he or she would serve this country in time of war regardless of personal scruples against such service. THIS CONCLUSION WAS REACHED IN THE ABSENCE OF REQUIREMENT IN EXPRESS TERMS THAT THE APPLICANT BE FREE OF SUCH CONSCIENTIOUS OBJECTIONS. IT WAS DEDUCED AS A LOGICAL IMPLICATION OF THE REQUIREMENTS OF CITIZENSHIP AND OF THE REQUIREMENT OF GOOD MORAL CHARACTER IN THE CIVIC SENSE.

It is true that there were dissenting opinions in both cases. It is likewise true that those dissents were written by illustrious jurists, the first dissent being written by Mr. Justice Holmes and the second by Chief Justice Hughes. But even if the dissenting opinions had prevailed, those cases would not sustain the petitioner in the instant case for the following very cogent reasons: In the *first* place, the dissenting opinions are quite as illuminating as the majority opinions; for in neither

case do the dissenting jurists suggest that a requirement that an applicant for civil privilege subordinate personal scruple to constitutionally enacted military policy would be unconstitutional **if such a requirement had been expressed and not left to inference by construction.** On the extreme contrary, Mr. Justice Hughes, in dissenting in the *Macintosh* case, expressly said that the question was not "one of the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization." He further said: "That authority, for the present purpose, may also be assumed."

No more did Mr. Justice Holmes even intimate, much less declare, that he would strike down as unconstitutional a provision enacted by Congress requiring absolute obedience, regardless of conscientious objection, to military policy as a prerequisite to citizenship. Moreover in the *Schwimmer* case, Mr. Justice Holmes predicated his decision very largely upon the fact, specific in that case and absent here, that the applicant for citizenship was an aged woman who could not under any conceivable circumstances be regarded as actually available for military service in any event.

Another case that, unless the capital principles of constitutional government which it affirms are themselves to be retracted, is decisively adverse to petitioner is *Hamilton* v. *Regents*, 293 U. S. 245. In that case, which arose in time of peace, certain adherents of the Methodist faith embraced the tenets of a conference of that church which "renounced war as an instrument of national policy" and, by their own petitions and the intercession of their bishop, sought exemption from the University of California's compulsory military training requirements. Now it should be observed at this point that the right to attend a state university is as surely

and as effectively a privilege from which citizens of the state can not be excluded as is a right to practice law; for this court has held that a Negro student cannot be denied a lawyer's education by a state which offers such an education to white students. *Missouri* v. *Canada*, 59 S. Ct. 232.

But this court, by a unanimous judgment expressed in a majority and a concurring opinion, perceived not the slightest merit in petitioner's claim to immunity from military service upon the grounds of religion. If, in time of peace, a student may be denied a university education unless he submits to military activities, why may not a candidate for a license to practice law unless he swears (or affirms) that he will support the law—not a part of the law—but the *whole* of the law of the State where he seeks to practice?

The policy enacted by the present draft laws and the exemption therefrom of conscientious objectors.

It does not appear that Congress, in declaring that one young man may, by the assertion of even sincere religious convictions, require another young man, who holds convictions more nearly consonant with those upon which his country is founded, to be slain in his place, was actuated by the slightest delicacy of sentiment or compunction for the personal liberty of the conscientious objector. The provision may as well be read as declaratory of a coldly calculated military policy which views those who believe themselves to have commands from God inconsistent with commands from their country as undesirable soldiers.

This court will take judicial notice that soldiers who refuse to obey orders because they deem themselves to

owe a duty to God higher than that imposed by the orders of man may endanger the safety of hundreds of their companions. Exclusion from military service is not, on the one hand, a privilege or, on the other hand, a punishment bearing the imputation of stigma. So far as we are aware, there is no recognized exemption from military service grounded solely upon the rights of the individual. Those with dependents are deferred that their dependents may not become public charges. Those doing work more important than that which presumably would be performed by them in the army are exempt for the good of the nation. The infirm, the feebleminded, and the morally unfit are exempted because their presence in the army would do more harm than good. The same is true of conscientious objectors.

Petitioner's beliefs and the office of lawyer.

It is against the background of these considerations of constitutional and common law that, if the decision of the Supreme Court of Illinois is properly subject to this court's scrutiny at all, that decision must be reviewed. We now turn to the application of these considerations to the case of the instant petitioner.

As has been indicated in the Statement of the Case, petitioner's beliefs go much further than a mere refusal to participate in war or in military activity which may result in the taking of life. He is categorically, absolutely and under all circumstances opposed to the taking of life under the authority of law.

He would not, for instance, countenance the killing of members of a mob in order to save a prisoner or the prevention of the kidnapping of a child, the rape of a

woman or the murder of one or any number of citizens by a law officer slaying the assailant.

It is evident that petitioner does not realize that the threat of force, extending to killing, is immanental in every law, in every judgment, in every sentence.

Let us take specific illustrations of the unfitness of one who does not accept this premise for the practice of law in America today.

Suppose that a judgment for possession is recovered by a plaintiff. Normally, the defendant yields possession upon the service of a writ of assistance. But if he does not, if he opposes the officer with force, then the officer must, in obedience to the precept of his writ, use force to expel the defendant from the premises. If the defendant draws a pistol, although the officer may retire instead of killing the defendant, he must, if he is to discharge the duties of his office, return with a constabulary sufficient in number to oust the defendant from the premises. If the premises are forcibly detained not by an humble share-cropper, but by a mighty corporation or a large group of insurgents holding property by opposing physical force to civil process, it may be necessary to exploit the military in order to execute even so simple a process as a writ of assistance.

The suggestion is not fanciful. The military has been used time and again in American history in the enforcement of civil writs.

The Supreme Court of Illinois was justified in concluding that quite apart from any considerations of petitioner's views as to *military* force, his objection to the use of force extending to the taking of life amounted to a repudiation of the ultimate sanction of government.

Petitioner seeks the right to practice law in Illinois. That right not only entitles but obliges those who possess it to advise and counsel others upon the nature and extent of their rights. Petitioner could not conscientiously advise a client as to how far he could go in vindicating such primal rights, upon which all civil and political rights ultimately depend, as those of the preservation of himself and his family. Petitioner could not, for instance, tell a client whose child was threatened with a kidnaping that he had a right to keep a rifle in the house and use it in order to protect himself, his wife or his children—that is, unless petitioner would be willing to advise another to do those acts which he believes to be murder.

In the celebrated case of *Babington* v. *Yellow Taxi Corporation*, 250 N. Y. 14, Judge (later Mr. Justice) Cardozo recognized the ancient common law doctrine of *posse comitatus*, holding that a taxicab and its driver might be impressed into pursuit of a fleeing felon, even though the felon might be killed and, as actually happened, innocent bystanders might be injured. The doctrine of *posse comitatus* is, in its fundamental principle, the very essence of Anglican common law. It is the principle by which legal process must ultimately be vindicated if the less overtly physical threats implied in the more civilized amenities of legal process are opposed by brute force. The constabulary, the militia and the army are nothing more than highly integrated forms of the *posse comitatus*—that is, they represent the impressment of the citizenry into forces which, by lethal sanction or the threat of lethal sanction, constitute the ultimate power of the nation. This principle is, as we have seen, in effect inscribed into Illinois' Constitution by militia provisions which require the service of

even conscientious objectors in time of war. Petitioner's views are inconsistent with this first great precept of Anglo-American jurisprudence and of constitutional law.

It should be emphasized that petitioner is not merely one who wishes to change these laws. There are many lawyers who advocate amendments to the Constitution of the United States, state constitutions, statutes, the lore of precedents in particular jurisdictions, and the trivial provisions of rules of courts and agencies. But petitioner is not merely one of these. **He is one who says that he will not obey these fundamental precepts of law even while they are the law.**

The Supreme Court of Illinois determined that one who held these extreme views, whatever might be his fitness for calling such as the clergy, medicine, agriculture, or the teaching of non-legal subjects, was prepossessed by conviction, which, though sincere, were inconsistent with the duties of an advocate.*

Petitioner cannot take an oath to support the Constitution of Illinois. If asked whether he will render the militia service required of him by the organic law of

* We note and here reply to petitioner's allusion to such cases as *Morgan v. Civil Service Commission*, 131 N. J. Law 411. In that case, it was held that a Jehovah witness, who could not conscientiously salute the American flag, could not on account of this particular precept of his creed be disqualified from the position of bridgetender under civil service laws. Granting that, as this court has held, religious scruples against saluting the flag as implying an act of obeisance to a power other than God do not disqualify a person from attendance at public schools and from discharging such posts as bridgetender, we cannot go further and grant that that scruple would not disqualify him for, for example, such a post as master-of-the-colors or sergeant-at-arms when the duties of the post required presentation of and salutation to the flag.

We can forbear other examples of the principle that, though a particular religious conviction that is not commonly shared may not disqualify its adherent for one post, it will most certainly disqualify from another.

One whose religious convictions oppose the use of surgery and medication could probably not be constitutionally disqualified under

Illinois he must answer, "No." He believes that others should not only oppose but disobey that law.

The question is not whether this court would have reached a similar determination. The question is whether it can say that the Supreme Court of Illinois acted with such arrant caprice as to deny the petitioner fundamental rights.

That is to say, that is the question if the right to practice law is within the purview of the Constitution at all.

For the reasons submitted under Point I, *ante*, we submit that the considerations developed under this Point need not be regarded.

But if the arguments advanced under Point I, *ante*, must for any reason be rejected, then we submit that the considerations developed under this Point require an affirmance of the order under review.

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civil service from even very important positions in the treasury department, but would certainly be disqualified from the right to practice medicine or the position of bacteriologist in a public health service. If we assume that in a state where the right to teach in the university was a matter of civil service, a "fundamentalist" could not be disqualified from teaching algebra, it would not follow that, if the fixed policy of the university was to teach the doctrine of organic evolution and the generally accepted views of cosmology, such a "fundamentalist" could not be disqualified from teaching biology and geology.

One who believed that it was a sin to aid others to be married by one not a clergyman might be qualified for a position in the county treasurer's office when he would, solely because of such belief, be disqualified from a post in the county clerk's office where marriage licenses would be issued if the licenses were to be used for the performance of marriage by judges.

In the instant case, petitioner is not a mere objector to his or others' *military service*. He proclaims an absolute repudiation of, and therefore the Supreme Court of Illinois properly inferred a refusal to follow or advise clients to follow, such fundamental principles of Illinois law as those pertaining to the militia, *posse comitatus*, self-defense and other principles that are, from the standpoint of Illinois jurisprudence, juristically primordial.

Conclusion.

For the reasons urged in this brief and in the showing in opposition to *certiorari*, we submit that the writ of *certiorari* should be quashed as having been granted in improvident excess of jurisdiction and for want of a federal constitutional question, or if such a question be deemed present, then the determination under review should be affirmed.

Respectfully submitted,

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